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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ERNESTO GUTIERREZ, Defendant and Appellant.	A133216 (Napa County Super. Ct. Nos. CR155028 & CR156335)

INTRODUCTION

Defendant Ernesto Gutierrez was convicted by jury of simple kidnapping (Pen. Code, § 207, subd. (a)),[1] false imprisonment by violence (§§ 236, 237, subd. (a)), and dissuading a witness (§ 136.1, subd. (c)(3)). Gutierrez argues that: (1) the trial court erred by failing to instruct the jury, sua sponte, on the defenses of self-defense and necessity, and on whether Gutierrez's movement of the victim was merely incidental to another crime; and (2) the evidence is insufficient to support his conviction of dissuading a witness. We reject these arguments. We agree with the parties that the false imprisonment conviction must be reversed, because that crime is a lesser included offense of kidnapping. We also agree with the parties that the trial court erred in sentencing, and that Gutierrez's sentence must be corrected.

[1] All statutory references are to the Penal Code unless otherwise stated.

FACTUAL AND PROCEDURAL BACKGROUND

The Charges

An amended information charged Gutierrez with simple kidnapping (count 1; § 207, subd. (a)), false imprisonment by violence (count 2; §§ 236, 237, subd. (a)), and dissuading a witness (count 3; § 136.1, subd. (c)(3)). The information alleged that Gutierrez had served a prior prison term (§ 667.5, subd. (b)), had two prior serious felony convictions (§ 667, subd. (a)(1)), and had two prior strike convictions (§ 667, subds. (b)-(i)).

The Evidence Presented at Trial

On December 24, 2010, Gutierrez met his former girlfriend (the victim), while she was walking back from a market with friends to her inpatient drug treatment program, Project 90, in Napa. The victim and Gutierrez had dated for four years, and lived together for about three years, until the victim entered Project 90 in November 2010. The victim and Gutierrez used drugs, including methamphetamines, and the relationship was characterized by violence on both sides. (Gutierrez testified that he had used drugs prior to his relationship with the victim, but claimed not to have done so during their relationship.)

The victim's father had invited the victim and Gutierrez over for Christmas dinner the next day. Gutierrez wanted to discuss that, and other matters, with the victim. The victim telephoned Gutierrez and told him not to come because he was running late and her break from Project 90 would end soon, but he came anyway.

The victim agreed to get into Gutierrez's truck so they could talk. Gutierrez agreed to drive the victim back to Project 90 and talk in the parking lot. The victim testified that she wanted to talk there so she would be safe and would not be late returning to her program. After getting into the truck, the victim began to eat a burrito that Gutierrez had bought for them to share. Gutierrez began to drive, but turned the opposite direction from Project 90 (turning left instead of right). The victim and Gutierrez testified differently as to what followed.

The victim testified that when Gutierrez turned the wrong way, she panicked and became scared because he was taking her away from where she had asked him to go. She asked him where he was going, and told him he was going in the wrong direction and to turn around. Gutierrez stopped the truck and acted like he was going to turn around, but then continued going straight. Gutierrez yelled at the victim and told her to "shut the F up." The victim continued screaming at Gutierrez, asking where he was going, asking to return to Project 90, and asking why he was doing this. Gutierrez kept telling the victim to "shut the F up" and that he needed to talk to her. When Gutierrez made a rolling stop at a stop sign, the victim opened the truck door and started to get out, but when she had one foot out, Gutierrez jerked her back by her hair. Because the truck was still moving, the victim screamed and told Gutierrez he was going to run over her legs and to please let go. Gutierrez told the victim to shut up a few times and to get into the truck. Gutierrez asked the victim if she was going to get into the truck if he stopped. The victim kept saying "[p]lease let go of me," "[you're] going to kill me," and "I don't want to die like this."

Gutierrez pulled into a court and stopped, picked up the victim by her belt loop and her hair, and pulled her back into the truck. He reversed out of the court and kept driving, holding onto her hair. When he stopped, he would pull her back in by her belt loop. Beginning when the victim tried to get out at the stop sign, she was hanging out of the truck—her hair was on the stick shift, her hips were where a passenger's feet would normally be, and her knees were hanging out of the truck. Her feet were dragging on the street. The victim was trying to get out of the truck "the whole time" by pulling away. She also kept her door open the whole time. She continued screaming and said " 'It's Christmas Eve. Why are you doing this?' " Gutierrez continued to drive.

At one point during the drive, when Gutierrez turned into a court, he collided with or hit something. Because Gutierrez had come to a complete stop, the victim attempted to get out, but he pulled her back in and continued driving. The victim kept asking Gutierrez to let her go. She did not hit him.

The victim saw some people chasing the truck. Gutierrez stopped and let go of the victim's hair, and she rolled out of the truck onto the curb. Gutierrez drove off.

The victim testified that the ordeal seemed to last 15 minutes, but could have been shorter. She testified she was not injured, but she felt sore and some of her hair fell out, and her shoes and jeans were torn.

The victim related these facts to the responding police officer, Joshua Coleman. When Coleman arrived at the scene, the victim was crying and hysterical. Her jeans were torn at the bottoms, and her shoes had abrasions all around the bottom of the rubber.

Coleman had the victim get into his car and followed the route the victim thought Gutierrez had driven in his truck. Driving the route took two to three minutes. Based on the victim's description of the incident and driving the route with her, Coleman testified to the following: After the victim got into the truck, Gutierrez began driving north on Parrish Road (the opposite direction from Project 90). The victim was afraid Gutierrez would harm her, so she opened the door, propped it open with her foot, and asked to get out of the truck. Gutierrez continued driving north on Parrish Road. When Gutierrez stopped at a stop sign at the intersection of Parrish Road and Shetler, the victim got her feet out, but Gutierrez grabbed her by her hair and pulled her back into the truck. Gutierrez then went east on Shetler. Her feet were hanging out of the truck, and Gutierrez was holding both her hair and the stick shift in his right hand. The victim yelled and screamed at Gutierrez to stop the truck and let her out, but he continued driving east on Shetler to Shurtleff.

Gutierrez turned right and drove south on Shurtleff to Sylvia Court, where he made a right turn into the court. As he made that turn, he was too close to the parked vehicles, and the passenger door of the truck hit another vehicle. (The victim showed Coleman the truck on Sylvia Court that was damaged by Gutierrez's truck; she also told him that Gutierrez had made two right turns before turning into Sylvia Court.) Gutierrez then backed out of Sylvia Court. He "backtracked his route" back to Shetler, where he turned right and continued eastbound. He drove north on Russell Street, turned right on Linden and drove east, and turned right on Maria Drive, heading south. The victim got

out of the vehicle on Maria Drive, and Gutierrez drove away. Coleman testified that the area where the incident occurred is residential with sidewalks and places one could pull a car over.

Del Pickard, an off-duty Napa State Hospital police officer who was driving home from work, noticed Gutierrez's truck because it looked like it was not going to stop at the stop sign at the corner of Shetler and Shurtleff. As the truck got closer, Pickard noticed the passenger door was open. The truck was going eastbound on Shetler, turned right and went south on Shurtleff. The truck did not stop at the stop sign, and Pickard noticed that the male driver was holding the female passenger by what looked like her shirt. It looked like the passenger was trying to get out, and there was a fight or struggle. Pickard called 911 and followed the truck. The passenger was holding the door open with her foot, like she was trying to get out.

As Pickard followed, Gutierrez turned into a side road where he "came up against a vehicle," then made a three-point turn and headed back north on Shurtleff to the intersection with Shetler (where Pickard had first seen him). Gutierrez turned right on Shetler, then left on Russell. Pickard had difficulty keeping up with Gutierrez, who was driving fast. The passenger door was open the whole time, with a foot or arm sticking out. Gutierrez turned right, then right again on Maria. Pickard then noticed that the passenger was holding the door with her hands, and her legs and feet were dragging on the pavement. The truck eventually slowed down on Maria, and the passenger let go. She tumbled, then got up and brushed herself off. The driver threw a purse out of the truck. Pickard followed the truck to get its license plate number, because he saw other people were helping the passenger. Pickard estimated that, from the time he first saw the truck until the passenger was able to get out, the truck traveled about one-and-one-half miles, and one to two minutes elapsed.

Gutierrez's testimony differed from the victim's. Gutierrez testified that he initially turned left and drove away from Project 90 because there was a car blocking his exit to the right. He intended to go around the block and drive to Project 90. The victim started yelling that he was going the wrong way, "freaking out," and telling him to turn

around. Gutierrez told her to hold on and he would turn around. They were in a residential area with no parking. He could not make a U-turn because there was a car behind him and another coming toward him. He also was reluctant to make a U-turn because his driver license was suspended and he did not have registration or insurance for his truck. He made a right turn, intending to go around and come back. The victim then threw the burrito at Gutierrez; it hit the window and some got in his hair and on his pants. The victim was screaming. She slapped him a few times. Gutierrez tried to calm the victim down, and told her he was taking her back to Project 90. The victim kept yelling and hitting Gutierrez. Gutierrez denied hitting the victim, but stated he tried to push her away.

Gutierrez turned into a court and hit a parked truck. Gutierrez testified that this happened because he was next to a parked vehicle and was backing up, when the victim opened the passenger door "and caused the door to bust all the way open, and it messed it up." He then became paranoid and scared because his license was suspended, and he did not have registration or insurance. He tried to get away from the scene of the accident and sped off. The victim tried to jump out of the truck, but Gutierrez grabbed her by her hair and sweater and pulled her back into the truck, because he was driving fast and he did not want her to get hurt. The victim's hair or sweater got stuck in the stick shift. Gutierrez got her unhooked and stopped the truck. As soon as he saw the victim was out of the truck and out of danger, Gutierrez drove off, throwing her purse out of the truck. He left the scene because he was frightened about being apprehended for the hit and run and driving with a suspended license. He parked the truck and walked to a house, where he asked to borrow the telephone to call and report his truck stolen.

Gutierrez testified that he drove only 100 yards after he saw the victim trying to get out of the truck. However, he also testified that, when the victim opened the door earlier (in the first court Gutierrez turned into), causing Gutierrez to collide with a parked vehicle, "that's when I guess she was trying to get out at that point."

Gutierrez testified that he believed Pickard, who was following Gutierrez's truck, had accurately described the route Gutierrez took.

The Verdict and Sentence

The jury convicted Gutierrez on all three charges. Gutierrez waived jury trial on the enhancement allegations, and the court found them to be true.

The court sentenced Gutierrez to an indeterminate term of 25 years to life for kidnapping (count 1), a consecutive determinate term of one year (one-third the midterm) for dissuading a witness (count 3), and a consecutive term of five years for a prior serious felony (§ 667, subd. (a)(1)). As to the false imprisonment charge (count 2), the court imposed a term of 25 years to life, but stayed the sentence pursuant to section 654.

DISCUSSION

I. *The Jury Instructions*

Gutierrez contends the trial court had a sua sponte obligation to instruct the jury to consider the applicability of the defenses of self-defense and necessity, and to consider whether Gutierrez's movement of the victim was incidental to another crime, i.e., Gutierrez's attempt to escape from the hit and run collision with the parked vehicle. We disagree.

A. *Legal Standards*

"A trial court bears a sua sponte duty to instruct the jury on the essential elements of an offense [citation], and ' "on the general principles of law governing the case," ' i.e., ' " 'those principles of law *commonly* or closely and openly connected with the facts of the case before the court' " ' [citation]. A 'criminal defendant is entitled to adequate instructions on the defense theory of the case' if supported by the law and evidence. [Citation.]" (*People v. Bell* (2009) 179 Cal.App.4th 428, 434 (*Bell*).)

As to defenses, the trial court has a duty to instruct sua sponte on "any affirmative defense for which the record contains substantial evidence [citation]—evidence sufficient for a reasonable jury to find in favor of the defendant [citation]—unless the defense is inconsistent with the defendant's theory of the case [citation]. In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.' [Citations.]" (*People v.*

Salas (2006) 37 Cal.4th 967, 982-983; accord, *People v. Breverman* (1998) 19 Cal.4th 142, 157.)

" 'An appellate court reviews the wording of a jury instruction de novo' [citation], and determines whether 'the instructions are complete and correctly state the law' [citation]." (*Bell, supra,* 179 Cal.App.4th at p. 435.)

B. *Incidental Movement*

Gutierrez argues that the kidnapping count must be reversed because the court did not instruct the jury to consider whether the movement of the victim for the kidnapping was "merely incidental" to an associated crime, i.e., Gutierrez's hit and run collision with a parked vehicle. We disagree.

Section 207, subdivision (a), provides, "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." A conviction of simple kidnapping under this statute requires proof that the victim (1) was moved by the use of physical force or fear; (2) did not consent to the movement; and (3) was moved for a substantial distance. (*Bell, supra,* 179 Cal.App.4th at p. 435.) This last element, movement for a substantial distance, is known as asportation. (*Ibid.*)

In determining whether the defendant moved his victim a substantial distance, the jury should "consider the totality of the circumstances." (*People v. Martinez* (1999) 20 Cal.4th 225, 237 (*Martinez*).) "[I]n a case where the evidence permitted, the jury might properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*Ibid.*) The jury, however, may convict of simple kidnapping "without finding an increase in harm or any other contextual factors," so long as the evidence shows the victim was moved a substantial distance. (*Ibid.*) Here, the trial court, using CALCRIM No. 1215, properly instructed the jury to consider any

increase in the risk of harm and other contextual factors in determining whether the movement was substantial.

Simple kidnapping under section 207, subdivision (a) differs from aggravated kidnapping in that it does not require the commission or intended commission of an underlying offense. (Compare §§ 209, subd. (b), 209.5.)[2] But in a simple kidnapping case that does involve an "associated crime," the court should instruct the jury to "consider whether the distance a victim was moved was incidental to the commission of that crime in determining the movement's substantiality." (*Martinez*, *supra*, 20 Cal.4th at p. 237.) When supported by the evidence, such an instruction must be given sua sponte. (*Bell*, *supra*, 179 Cal.App.4th at pp. 434-435.)[3] An "associated crime" is "*any* criminal act the defendant intends to commit where, in the course of its commission, the defendant also moves a victim by force or fear against his or her will." (*Bell*, *supra*, 179 Cal.App.4th at pp. 438-439.)

The standard kidnapping instruction, CALCRIM No. 1215, includes bracketed language permitting the jury to consider "whether the distance the other person was moved was beyond that merely incidental to the commission of [the associated crime]" in determining whether the movement was substantial. Here, the court gave CALCRIM No. 1215 without the bracketed language and did not otherwise instruct the jury to consider whether the movement of the victim was incidental to an uncharged crime

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[2] Aggravated kidnapping also has a different standard of asportation, which requires movement of the victim that is "not merely incidental to the commission of the underlying crime and that increases the risk of harm to the victim over and above that necessarily present in the underlying crime itself." (*Martinez*, *supra*, 20 Cal.4th at p. 232; see also *Bell*, *supra*, 179 Cal.App.4th at pp. 435-436.) Gutierrez incorrectly suggests that this standard applies here.

[3] The *Bell* court stated that "whether the movement was over a distance merely incidental to an associated crime is simply one of several factors to be considered by the jury (when permitted by the evidence) under the 'totality of circumstances' test enunciated in *Martinez*. The factor is *not* a separate threshold determinant of guilt or innocence, separated from other considerations bearing on the substantiality of the movement . . . ." (*Bell*, *supra*, 179 Cal.App.4th at p. 440.)

arising from the hit and run collision. Gutierrez did not request inclusion of the bracketed language or any other instruction on this issue.

Gutierrez relies on *Bell*, in which the appellate court reversed after the trial court failed to instruct sua sponte that the jury should consider whether a kidnapping charge was incidental to a charge of recklessly evading a police officer under Vehicle Code section 2800.2. (See *Bell*, *supra*, 179 Cal.App.4th at pp. 433-434, 438-440.) The defendant in *Bell* had fled from the police in his car while his estranged wife was an unwilling passenger; he was convicted of both evading the police and kidnapping based on this conduct. (*Id.* at pp. 431-433.) The appellate court held that, under these circumstances, "the court should have instructed the jury that, in determining whether defendant's movement of [the victim] was substantial, they could consider whether the movement was merely incidental to the crime of evasion (as one factor among others)." (*Id.* at p. 439.) Because the trial court did not instruct on this issue, "the court's instruction on the asportation element of simple kidnapping was incomplete," and "the error violated defendant's right to a correct jury instruction on all the elements of the offense of simple kidnapping."[4] (*Ibid.*) The appellate court further concluded the error was not harmless under the standard for federal constitutional error set forth in *Chapman v. California* (1967) 386 U.S. 18. (*Bell*, at pp. 439-440.)

We conclude that the trial court here did not have a sua sponte duty to instruct on whether the victim's movement was incidental to a crime arising from the hit and run collision. At the outset, we note that, in contrast to *Bell* (in which the defendant was charged with both kidnapping and evading the police) (see *Bell, supra,* 179 Cal.App.4th at p. 433), Gutierrez was not charged with a crime arising from the hit and run collision. Even on appeal, Gutierrez does not specify the precise crime that he contends the trial court should have treated as an "associated crime" for purposes of the bracketed language

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4 Gutierrez incorrectly suggests that the question whether the victim's movement was incidental to another crime is an *affirmative defense* to kidnapping. This is incorrect—in a simple kidnapping case, the question whether the movement was incidental to an associated crime is relevant to the asportation *element* of simple kidnapping. (See *Martinez, supra,* 20 Cal.4th at p. 237; *Bell*, *supra,* 179 Cal.App.4th at p. 439.)

in CALCRIM No. 1215. Assuming a trial court may in some circumstances have a sua sponte duty to discern from the evidence that the defendant in a simple kidnapping case may have committed an uncharged "associated crime," and to instruct the jury to consider whether a victim's movement was "merely incidental" to that uncharged crime, no such duty arose here, because the evidence did not support a finding that the movement of the victim was "merely incidental" to Gutierrez's attempt to flee the scene of the hit and run collision. To the contrary, the undisputed evidence establishes that the movement of the victim was well underway when the collision occurred.

According to the victim's testimony, her description of the route to Officer Coleman, and the testimony of Del Pickard (who followed Gutierrez), the collision occurred in a court, after Gutierrez had begun driving and had made two or three turns. Gutierrez's testimony was also consistent with that of the other witnesses on this point—Gutierrez testified that Pickard accurately described the route Gutierrez took. Gutierrez also described driving with the victim in the truck, and making at least one turn, prior to the collision. The undisputed evidence thus establishes that a significant portion of the movement of the victim occurred before the collision.

The undisputed evidence also establishes this movement was accomplished through force or fear. Well before the collision, the victim objected to continuing to drive with Gutierrez away from Project 90. The victim testified that, when Gutierrez made the initial wrong turn, she panicked and became scared, asked him where he was going, and screamed at him, telling him he was going in the wrong direction and to turn around. At a stop sign, the victim opened the door and attempted to get out, but Gutierrez pulled her back in by her hair and kept driving. Beginning when she tried to get out at the stop sign (prior to the collision), the victim was hanging out of the truck; she kept her door open the whole time; and she was trying to get out of the truck the whole time by pulling away. The victim related this same account to Officer Coleman. Similarly, Pickard testified that, from the time he first saw Gutierrez's truck (prior to the collision), the passenger door was open, and it appeared the passenger was trying to get out, but the driver was holding her in. The door was open the whole time.

In contrast to the above witnesses, Gutierrez testified that the victim opened the door in the court just prior to the collision (causing the door to hit the parked car), and that the victim did not try to jump out of the truck until after the collision. However, even Gutierrez testified that the victim began objecting much earlier to his driving away from Project 90. Gutierrez testified that, as soon as he made his initial wrong turn, the victim started yelling that he was going the wrong way, "freaking out," and telling him to turn around. The victim threw the burrito at Gutierrez, yelled at him, and slapped or hit him.

The prosecutor's theory, as stated in closing argument, was that, although the victim initially consented to ride in Gutierrez's truck back to Project 90, she withdrew her consent "very quickly," and was "no longer freely and voluntarily going with him." The prosecutor noted that the victim immediately "started screaming." The prosecutor emphasized that, even accepting Gutierrez's version of the incident, the victim "began panicking and screaming almost immediately when he made that wrong turn, when he went in the opposite direction from where she had told him to take her."

Case law establishes that, even if " 'the victim has at first willingly accompanied the accused, the latter may nevertheless be guilty of [kidnapping] if he subsequently restrains his victim's liberty by force and compels the victim to accompany him further.' [Citations.]" (*People v. Camden* (1976) 16 Cal.3d 808, 814 (*Camden*).) In *Camden,* the victim initially entered the car voluntarily but when she realized the defendant was not driving her home she protested and asked to be driven home or to be let out of the car. (*Id.* at p. 811.) The defendant ignored her requests, stopped her from opening the door, and then used the continued movement of his car to prevent her from escaping. (*Id.* at pp. 811-812.) The court concluded this evidence supported the conclusion that although the initial entry was voluntary, threat or force was used to restrain the victim while being asported. (*Id.* at pp. 814-815.) Similarly, in *People v. La Salle* (1980) 103 Cal.App.3d 139, at page 143 (*La Salle*) (overruled on other grounds by *People v. Kimble* (1988) 44 Cal.3d 480, at page 496, footnote 12), the victim was induced to enter the car when the defendant told her that if she wanted her child back she would have to get in the car. The

court concluded this threat was sufficient to make her initial entry into the car an entry induced by force. (*La Salle*, *supra*, 103 Cal.App.3d at p. 146.) However, the court also held that even if the initial entry was consensual, it became a kidnapping by force because he refused to allow the victim to leave the car despite her protests that she had to go home, and used the continued movement of the vehicle to prevent the victim from leaving. (*Id.* at pp. 146-147.) Other courts have reached similar conclusions. (See, e.g., *People v. Trawick* (1947) 78 Cal.App.2d 604, 606 ["It is not necessary that the original accompaniment of the abductor be involuntary, if subsequently there is an enforced restraint of liberty"]; cf. *People v. Felix* (2001) 92 Cal.App.4th 905, 910.)

Under these cases, when a victim enters a vehicle voluntarily, the subsequent movement is consensual rather than forced asportation. However, when the victim withdraws the initial consent and demands by word or deed to be released from the vehicle, or to be returned to a place of safety (see *Camden, supra,* 16 Cal.3d at p. 811 [victim asked to be driven home or to be let out of the car]), and the defendant ignores the demand and continues driving, the defendant at a minimum uses the threat of injury (e.g., the injury that would inevitably result if the victim tried to escape a moving vehicle) to restrain the victim's liberty. Here, even by Gutierrez's account, the victim began yelling and screaming at Gutierrez almost immediately after he made the initial wrong turn, asking where he was going and demanding that he return her to Project 90.

Because the asportation of the victim by force or threat was well underway before the hit and run collision, the evidence did not support a finding that the victim's movement was "merely incidental" to Gutierrez's attempt to flee the scene of the collision. Accordingly, in instructing on the asportation element of simple kidnapping, the trial court did not have a sua sponte duty to insert the bracketed language in CALCRIM No. 1215 and instruct the jury to consider whether the victim's movement was merely incidental to an uncharged crime arising from the hit and run collision.

Even if the trial court should have instructed sua sponte on this issue, its failure to do so was harmless beyond a reasonable doubt. (See *Bell*, *supra*, 179 Cal.App.4th at pp. 439-440 [harmless error standard].) For the reasons discussed above, no reasonable

jury would have found that the victim's movement was merely incidental to some uncharged crime arising from the hit and run collision that occurred in the middle of the alleged kidnapping. Moreover, under *Martinez* and *Bell*, even when it is appropriate to instruct the jury to consider whether a victim's movement is merely incidental to an associated crime, that issue is only one factor in determining whether the victim was moved a substantial distance. (See *Martinez*, *supra*, 20 Cal.4th at p. 237; *Bell*, *supra*, 179 Cal.App.4th at p. 440; CALCRIM No. 1215.) Here, the other factors enumerated in CALCRIM No. 1215 (on which the jury was properly instructed) all pointed toward a conclusion that the victim was moved a substantial distance. The actual distance moved was about one-and-one-half miles, according to Pickard's description of the route, which Gutierrez testified was accurate. Gutierrez's movement of the victim away from Project 90, and his continuing to drive after she protested and tried to get out of the truck, increased the risk of harm to the victim and the danger to her of a foreseeable escape attempt. Indeed, the movement and Gutierrez's accompanying effort to hold the victim in the truck resulted in her being dragged from the truck, which could have resulted in serious injury or death. Finally, the movement of the victim away from the safety of Project 90, in the isolation of Gutierrez's truck, gave Gutierrez an opportunity to commit additional crimes and avoid detection. In light of these factors, we conclude that any error in failing to instruct on the incidental movement factor was harmless beyond a reasonable doubt.

C. *Self-Defense*

Gutierrez contends the trial court should have instructed sua sponte on the defense of self-defense as to the kidnapping charge.[5] We disagree.

"Self-defense negates culpability for assaultive crimes, whether or not the assault results in death." (*People v. Adrian* (1982) 135 Cal.App.3d 335, 340.) A defendant acts in lawful self-defense if " 'one, the defendant reasonably believed that he was in

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[5] Gutierrez also argues the trial court should have instructed on self-defense as to the false imprisonment charge. We need not address this argument, because we conclude below that the false imprisonment conviction must be reversed on other grounds.

imminent danger of suffering bodily injury . . . or was in imminent danger of being touched unlawfully; two, the defendant reasonably believed that the immediate use of force was necessary to defend against that danger; and three, the defendant used no more force than was reasonably necessary to defend himself against that danger.' (CALCRIM No. 3470.)" (*People v. Clark* (2011) 201 Cal.App.4th 235, 250.)

Here, there was no substantial evidence supporting a self-defense instruction, because no reasonable juror would have found that Gutierrez's forcible, extended asportation of the victim was reasonably necessary to defend Gutierrez against a danger posed by the victim. Gutierrez relies on his testimony that, after he made the initial wrong turn, the victim assaulted him by throwing the burrito at him and slapping or hitting him. Gutierrez testified that, in response, he tried to push the victim away. But, even according to Gutierrez's own testimony, he did much more than push the victim away. He continued driving, making several turns, and, when the victim tried to get out of the truck, he grabbed her by her hair and held her in the truck while continuing to drive. Gutierrez's testimony that the victim initially slapped or hit him would not have raised a reasonable doubt as to whether these actions were in self-defense and involved no more force than reasonably necessary for Gutierrez to defend himself.

In his appellate brief, Gutierrez appears to concede this point. He states: "It is not contended that self-defense was necessarily applicable to all of [Gutierrez's] actions on that day, but to his initial reactions when [the victim] first began to assault him." Gutierrez nevertheless contends that the trial court should have instructed sua sponte on self-defense, because that defense "must . . . be viewed in context with the other applicable defenses that arose during that incident," such as necessity and whether the movement was incidental to the hit and run collision. Gutierrez argues that "[t]hese defenses arose in immediate succession and should have been considered in conjunction with each other."

We reject this argument. Whatever merit this theory of combined defenses might have had if Gutierrez had expressly pursued it at trial and requested instructions supporting it, Gutierrez has presented no authority that the trial court had a sua sponte

duty to piece together such a defense strategy, and to instruct on different defenses that might arguably apply to different portions of Gutierrez's actions. As noted above, a trial court's duty to instruct sua sponte on an affirmative defense arises when the record contains substantial evidence supporting it, i.e., evidence that, if believed, would be sufficient to raise a reasonable doubt as to the defendant's guilt. (See *People v. Salas, supra,* 37 Cal.4th at pp. 982-983; *People v. Breverman, supra,* 19 Cal.4th at p. 157.) For the reasons stated above (and as Gutierrez appears to concede), there was not sufficient evidence to raise a reasonable doubt as to whether Gutierrez's forcible asportation of the victim was justified on a theory of self-defense. The trial court was not obligated to instruct sua sponte on that defense.

D. *Necessity*

Gutierrez contends the trial court should have instructed sua sponte on the defense of necessity in connection with the kidnapping charge.[6] Similar to his argument about self-defense, Gutierrez does not contend necessity justifies his entire course of conduct, but focuses on just one of his actions. Specifically, Gutierrez relies on his testimony that, when the victim tried to jump out of the truck, he grabbed her by her hair and sweater and pulled her back into the truck, because he was driving fast and did not want her to get hurt. Gutierrez testified that, although the victim's hair or sweater became entangled with the stick shift, Gutierrez got her unhooked and then stopped the truck.

"To justify an instruction on the defense of necessity, a defendant must present evidence sufficient to establish that [he] violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which [he] did not substantially contribute to the

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6 We need not address Gutierrez's argument that the court should have instructed on the necessity defense as to the false imprisonment count, because we reverse that conviction on other grounds.

emergency. [Citations.]" (*People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135; accord, CALCRIM No. 3403.)

The trial court here did not have a sua sponte duty to instruct on necessity, because there was no substantial evidence that necessity justified Gutierrez's violation of the law, i.e., his kidnapping of the victim. There is no evidence that Gutierrez had no reasonable legal alternative to kidnapping the victim. Instead of driving her away from Project 90 against her will and continuing to drive even when she was hanging out of the truck, he could have stopped and let her out. Although Gutierrez testified that he drove about 100 yards after the victim first tried to get out, and could not stop earlier because of cars parked on the right side of the street, he presented no reason why he could not stop earlier and let her get out on the driver's side. There also is no substantial evidence that Gutierrez did not create a greater danger than he avoided, or that he did not substantially contribute to the emergency. By driving away from Project 90 and failing to stop and let the victim out earlier, Gutierrez created the emergency (i.e., the victim's attempt to escape by getting out of the moving truck) that he claims justifies his action in pulling her back in by her hair. Gutierrez also increased the danger to the victim by continuing to drive while she was hanging out of the truck.

Gutierrez appears to contend that his course of conduct was justified by necessity in combination with other defense theories. As discussed above, Gutierrez has presented no authority that the trial court had a sua sponte duty to piece together, and instruct on, a defense strategy comprised of different defenses arguably applicable to different portions of his conduct.

II. *False Imprisonment*

The parties correctly note that false imprisonment is a lesser included offense of kidnapping, and that Gutierrez may not be convicted of both offenses based on the same conduct. (See *People v. Shadden* (2001) 93 Cal.App.4th 164, 171; *People v. Chacon* (1995) 37 Cal.App.4th 52, 65; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120-1121.) The false imprisonment conviction (count 2) is reversed.

III. *Sufficiency of the Evidence on Count Three*

A. *Background*

After the events underlying the kidnapping and false imprisonment charges and after the victim testified at the preliminary hearing for those charges, Gutierrez sent his cousin a letter and a card addressed to the victim. The victim read them when she visited her dog at the cousin's house. In the letter, Gutierrez stated that, if the victim went to southern California and the district attorney could not find her, there would be no case against Gutierrez and the charges would be dropped. In the card, Gutierrez stated that, if the victim told the district attorney and Gutierrez's attorney that the incident in the truck was a misunderstanding, then "this nightmare would be over." When Gutierrez sent the letter and card, a restraining order was in effect protecting the victim and prohibiting Gutierrez from contacting her. Gutierrez understood the order prohibited him from contacting the victim.

B. *Analysis*

Gutierrez contends there is insufficient evidence to sustain his conviction of dissuading a witness (count 3; § 136.1, subd. (c)(3)). To determine whether the prosecution met its burden to prove a charge beyond a reasonable doubt, we apply the "substantial evidence" test. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.) Under that standard, we " 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses *substantial evidence*—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*Id.* at pp. 260-261.)

Under section 136.1, it is a crime to knowingly and maliciously prevent or dissuade, *or* to knowingly and maliciously *attempt* to prevent or dissuade, a witness or victim from attending or giving testimony at any trial or other proceeding. (§ 136.1, subds. (a)(1) & (2).) Section 136.1, subdivision (c) imposes increased punishment where the defendant committed one of the above acts knowingly and maliciously under specified circumstances, including where the act is accompanied by force or a threat of force or violence (§ 136.1, subd. (c)(1)), *or* where the defendant has previously been

convicted of dissuading a witness (§ 136.1, subd. (c)(3)).[7] Gutierrez was charged under section 136.1, subdivision (c)(3), based on a prior conviction of dissuading a witness; he was not charged with use of force or threats under section 136.1, subdivision (c)(1).

Gutierrez contends the evidence is insufficient because, although he "did express his clear preference" that the victim not testify, there was no proof that he intended to take further actions to prevent her from doing so. He argues that he did not express or imply that any "retribution" or "consequences" would follow if the victim did not comply with his request that she not testify. But proof of these elements was not required. As Gutierrez concedes in his reply brief, proof of force or threats was not required for conviction under section 136.1, subdivision (c)(3). The jury was properly instructed that the People had to prove that Gutierrez "maliciously tried to discourage [the victim] from attending or giving testimony at the jury trial," and that he "knew he was trying to discourage [the victim] from attending or giving testimony at the jury trial and intended to do so." (See § 136.1, subds. (a)(2), (c)(3); CALCRIM No. 2622.) The letter and card Gutierrez sent provided substantial evidence that he tried to discourage the victim from testifying (and that he knew he was trying to discourage her and intended to do so). Gutierrez stated his preference that the victim not testify, and he suggested specific courses of action she could take instead of testifying (i.e., moving to southern California, or telling the district attorney the incident was a misunderstanding).[8]

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[7] A person who attempts to commit an act prohibited by the statute is guilty of the offense attempted. (§ 136.1, subd. (d).) The fact that no person was injured physically or was in fact intimidated is not a defense. (*Ibid.*)

[8] Gutierrez cites *People v. Womack* (1995) 40 Cal.App.4th 926, 930 (*Womack*), in which the court stated that a conviction under section 136.1, subdivision (c)(1) (use of force or threat to prevent or dissuade or attempt to prevent or dissuade a witness from testifying) requires "the specific intent to keep the witness from giving any testimony." (Italics omitted.) Contrary to Gutierrez's apparent suggestion, the *Womack* court did not hold or state that, when a defendant tries to discourage a witness from testifying (and intends to do so), the People must also prove that the defendant intended to take further actions to prevent the witness from testifying.

In his reply brief, Gutierrez suggests there was insufficient proof of the required element of malice. (See § 136.1, subds. (a)(2), (c).) We disagree. For purposes of section 136.1, malice means "an intent to vex, annoy, harm, or injure in any way another person, *or* to thwart or interfere in any manner with the orderly administration of justice." (§ 136, subd. (1), italics added.) Because Gutierrez's statements evidenced an intent that the victim change her testimony or not testify, they provide substantial evidence of malice.

IV. *The Sentence*

The trial court declined to dismiss Gutierrez's prior strike convictions as to the kidnapping and false imprisonment convictions, but dismissed the prior strikes as to the dissuading a witness count. The court sentenced Gutierrez to an indeterminate term of 25 years to life for kidnapping (count 1), a consecutive determinate term of one year (one-third the midterm) for dissuading a witness (count 3), and a consecutive term of five years for a prior serious felony (§ 667, subd. (a)(1)).[9]

The Attorney General contends the court should have sentenced Gutierrez to the full middle term on count 3 (dissuading a witness), rather than one-third the midterm. Gutierrez agrees.[10] "A claim that a sentence is unauthorized . . . may be raised for the first time on appeal, and is subject to judicial correction whenever the error comes to the attention of the reviewing court." (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.) We agree with the parties that the sentence on count three (one year; one-third the midterm) is erroneous, but we do not agree that the court was required to impose the full middle term of three years. Instead, we conclude that the trial court had discretion to

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9 As to false imprisonment (count 2), the court imposed a term of 25 years to life, but stayed the sentence pursuant to section 654.

10 Gutierrez also responds to the Attorney General by noting that the trial court had discretion to dismiss the prior strikes as to count three (as it did), and therefore was not required to impose an indeterminate 25-years-to-life sentence on that count. (See *People v. Garcia* (1999) 20 Cal.4th 490, 492-493.) We do not read the Attorney General's brief as disputing the trial court's discretion to dismiss the prior strikes.

impose the lower, middle, or upper term (two, three, or four years). We remand to permit the court to exercise its discretion on this point.

When consecutive *determinate* terms are imposed for multiple felonies, section 1170.1, subdivision (a) provides that the principal term is a full term, and any subordinate term generally consists of one-third of the middle term for that offense. (§ 1170.1, subd. (a); *People v. Neely* (2009) 176 Cal.App.4th 787, 797-798 (*Neely*).) The determinate sentencing act, section 1170 et seq., includes exceptions to the procedure set forth in section 1170.1, subdivision (a). (See *People v. Felix* (2000) 22 Cal.4th 651, 655.) One such exception, section 1170.15, provides that, when a defendant is convicted of a felony and of a felony charge of dissuading a witness as to that first felony, the sentence for a subordinate consecutive term must be the full middle term (rather than one-third the middle term).**11**

Indeterminate term crimes generally are subject to a different sentencing scheme than determinate term crimes. (*Neely, supra*, 176 Cal.App.4th at p. 797.) For indeterminate term crimes, section 1170.1 does not apply, and there are no principal or subordinate terms to be selected. (§ 1168, subd. (b); *Neely*, at p. 798.) The court just imposes the statutory term of imprisonment for the indeterminate sentence crime. (*Neely*, at p. 798.)

As the Attorney General notes, when a case involves both indeterminate term offenses and determinate term offenses, the court must consider and calculate the indeterminate and determinate portions of the sentence separately. (*Neely, supra*, 176 Cal.App.4th at p. 798; *People v. Reyes* (1989) 212 Cal.App.3d 852, 856; *People v.*

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11 Section 1170.15 states: "*Notwithstanding subdivision (a) of Section 1170.1 which provides for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment*, if a person is convicted of a felony, and of an additional felony that is a violation of Section 136.1 or 137 and that was committed against the victim of, or a witness or potential witness with respect to, or a person who was about to give material information pertaining to, the first felony, . . . *the subordinate term for each consecutive offense that is a felony described in this section shall consist of the full middle term of imprisonment for the felony for which a consecutive term of imprisonment is imposed* . . . ." (Italics added.)

McGahuey (1981) 121 Cal.App.3d 524, 531-532; see Cal. Rules of Court, rule 4.451(a).) " 'Such sentencing has been conceptualized as sentencing in separate boxes.' [Citation.] The trial court separately determines the sentences to be imposed for each category of crime, and then 'combines the two to reach an aggregate total sentence. Nothing in the sentencing for the determinate term crimes is affected by the sentence for the indeterminate term crime[s].' [Citation.] When the defendant is sentenced to determinate and indeterminate terms, the determinate term is served first. [Citation.]" (*People v. Rodriguez* (2012) 207 Cal.App.4th 204, 211.) However, neither the determinate term nor the indeterminate term is " 'principal' or 'subordinate.' " (*People v. Reyes*, at p. 856.) Because the determinate term is not subordinate, a full term, rather than one-third the midterm, may be imposed. (*Ibid.*; accord, *People v. McGahuey*, at pp. 531-532.)

Applying these principles, the trial court erred in imposing one-third the midterm for dissuading a witness. The trial court "erroneously applied the principal term/subordinate term methodology set forth in section 1170.1 to all of the offenses," and in effect designated the indeterminate term for kidnapping as the principal term under section 1170.1. (See *Neely, supra,* 176 Cal.App.4th at p. 797.) Instead, the court should have calculated the determinate and indeterminate terms independently. The sole determinate term offense—dissuading a witness under section 136.1, subdivision (c)(3)—carried a sentence of two, three or four years. The court should have selected one of those terms and then combined it with the indeterminate term to reach an aggregate total term. (See *People v. Rodriguez, supra,* 207 Cal.App.4th at p. 211.)

The Attorney General argues briefly that, under section 1170.15, the trial court was required to impose the full middle term of three years; Gutierrez concedes the point without discussing it. We disagree. As discussed above, section 1170.15 is phrased as an exception to section 1170.1, subdivision (a), which specifies the usual procedures for imposition of consecutive *determinate* sentences, including the calculation of principal and subordinate terms. Section 1170.15 states that, "[n]otwithstanding" section 1170.1, subdivision (a), when a defendant is convicted of a felony and of a felony dissuading a

witness as to that first felony, and if consecutive terms are imposed, the "subordinate term" is imposed as the full middle term, rather than one-third of the middle term. (§ 1170.15.)

Because section 1170.15 specifies that it applies to a "subordinate term" (a concept applicable only to consecutive *determinate* terms), and that it applies "[n]otwithstanding" the one-third the midterm rule in section 1170.1, subdivision (a) (i.e., the general rule for consecutive *determinate* terms), we conclude it does not apply in this case, which does not involve consecutive determinate terms. It involves an indeterminate term and a single determinate term. Neither term is principal or subordinate (see *People v. Reyes*, *supra*, 212 Cal.App.3d at p. 856; accord, *Neely*, *supra*, 176 Cal.App.4th at p. 797), so section 1170.15's specification of the sentence applicable to a "subordinate term" does not apply.

Instead, in calculating the determinate term sentence for dissuading a witness under section 136.1, subdivision (c)(3) separately and independently from the indeterminate term crime, the trial court had discretion to select the lower, middle or upper term specified in the statute (two, three or four years).

We cannot conclude from the record that, if the trial court had understood it possessed this discretion, it would have chosen to impose the middle term. In explaining its decision to dismiss the prior strikes as to the dissuading count, the court found that, although the jury had correctly determined that Gutierrez's letters to the victim "fit within" section 136.1, subdivision (c)(3), Gutierrez's conduct in connection with that charge was "of a very minor nature and not of the serious nature, not involving threats and the pattern of violence that existed." In contrast to Gutierrez's prior dissuading conviction, his conduct in this case "was more of a request for a conduct as opposed to the threat." The court concluded: "And for purposes of sentencing under People versus Romero the court will as to Count Three strike the two priors and impose the consecutive sentence of the mid term of three years reduced to one third which would be for an additional one year." It is unclear from this statement whether the court chose to impose the middle term because it believed that term appropriate, or whether it referred to "the

mid term of three years reduced to one third" because it erroneously believed that the one-third the midterm formula applied. We will remand for the court to determine whether to impose a sentence of two, three, or four years on count three.[12]

DISPOSITION

The false imprisonment conviction (count 2) is reversed. The sentence for dissuading a witness (count 3) is vacated. The trial court is instructed to hold a new sentencing hearing, at which it shall impose the lower, middle, or upper term for that crime. In all other respects, the judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

[12] The trial court correctly determined that the sentence on count three must be consecutive to the three-strikes sentence on count one. (See *People v. Garcia*, *supra*, 20 Cal.4th at p. 500, citing §§ 667, subd. (c)(6)–(8), 1170.12, subd. (a)(6)–(8).)